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In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

NORMAN MINETA, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF FOR THE CITY AND COUNTY OF DENVER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

J. WALLACE WORTHAM, JR.
JOHN R. GROSS
NORMAN R. BANGEMAN
DEAN SPEIRS
VICTORIA ORTEGA
LAURIE HEYDMAN
City and County of Denver
353 City and County Building
1437 Bannock Street
Denver, Colorado 80202
(720) 913-3250

EILEEN PENNER
Counsel of Record
Mayer, Brown & Platt
1909 K Street N.W.
Washington, D.C. 20006
(202) 263-3000

LAUREN J. ROSENBLUM
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019
(212) 506-2500

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BRIEF FOR THE CITY AND COUNTY OF DENVER AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The City and County of Denver ("Denver"), like many American cities, has received consistent and credible reports of racial discrimination in the construction contracting industry.[1] In response to these complaints, Denver commissioned a series of statistical studies and marshaled substantial anecdotal evidence, all of which demonstrated that discrimination and its lingering effects pervade the Denver construction market. Majority and minority contractors' associations, business people, and government actors alike testified to the entrenched nature of the discrimination, and the insidiousness of its effects on the ability of minority contractors to compete for construction projects. The evidence showed that absent affirmative action, minority-owned construction firms would be deprived of a genuine opportunity to compete for municipal projects in Denver, and their participation in these projects would plummet.

In response, Denver developed and implemented an exceedingly modest remedial program. The program requires merely that prime contractors working on City projects make good-faith efforts to solicit subcontracting bids from minority-owned businesses, and that they refrain from refusing to work with qualified minority subcontractors that are also the lowest-bidders for the project.[2]

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[1] This brief is filed by J. Wallace Wortham, Jr., City Attorney of the City and County of Denver pursuant to Rule 37.4 of the Rules of the Supreme Court.

[2] The constitutionality of Denver's program is currently on review in the Tenth Circuit, in *Concrete Works of Colorado, Inc.* v. *City*

Denver adopted this program because it has a strong interest in ensuring that it neither funds current discrimination, nor perpetuates the effects of past discrimination by rewarding the beneficiaries of discrimination with new contracting opportunities while passing over discrimination's victims. Denver writes to emphasize that state and local governments can only vindicate these critically important interests if it is feasible for them to adduce a "strong basis in evidence" (see *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 510 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality)) when entrenched discrimination or its effects actually distort their local contracting markets. Denver urges the Court to reject Petitioner's and its amici's invitation to transform the evidentiary requirement that a governmental body must muster a "strong basis" for inferring discrimination into an insurmountable obstacle to the adoption of much-needed remedies.

SUMMARY OF ARGUMENT

Under this Court's precedent, the government has the power — and indeed an affirmative duty — to refrain from "exacerbating a pattern of prior discrimination." *Croson*, 488 U.S. at 504 (plurality). The construction industry is marked by a pattern of prior discrimination that has left minority businesses unable to compete effectively for federal contracts because they are hamstrung by decades of virulent discrimination. These businesses have suffered (and continue to suffer) discrimination at the hands of clients and prime contractors; they pay higher prices for loans, bonding and supplies; and they are left out of the informal referral networks that are critical to contracting opportunities. In the absence of

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and County of Denver, Colorado, No. 00-1145, final disposition of which will await disposition of the case at bar.

affirmative action, the government would have no choice but to continue to pour public funds into this industry, thereby rewarding the firms that have benefitted from a racist system, freezing the status quo, and "tight[ening] the deadhand grip of prior discrimination * * * on the present and future." *Id.* at 538 (Marshall, J., dissenting).

The government's evidence of that pattern of discrimination is specific, powerful, and comprehensive. *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (1996) ("*The Compelling Interest*") incorporates by reference dozens of statistical studies and a mountain of anecdotal evidence, all of which demonstrates that "racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets." *Id.* at 26,050.

This case thus stands in marked contrast to *Croson*. In *Croson*, Richmond put forth no such evidence in support of its affirmative action program. Its only statistical proof compared the proportion of contracts awarded to minority firms to the minority proportion of the population at large, and thus relied on the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." 488 U.S. at 507 (citation and quotation marks omitted). Here, by contrast, the federal government offers many detailed statistical analyses, each of which documents substantial disparities between the proportion of contracts awarded to minorities in a particular geographic area and the proportion of minorities in the relevant sample pool: the set of contractors qualified and available to work on construction projects in that area. Richmond offered no anecdotal evidence; its only testimony consisted of statements by minority contractors who attributed

underutilization of minorities in the Richmond construction market to their unavailability. Here, by contrast, the government offers numerous anecdotal examples of discrimination against minority contractors. In Richmond, a legislature hastily enacted a rigid quota system with little basis in evidence. Here, the federal government has carefully developed and refined a highly flexible affirmative action plan reflecting precisely the values articulated by this Court. Yet, in the face of these obvious and dispositive differences, Petitioner seeks to equate this case with *Croson*.

Perhaps realizing that its failure to adduce any evidence in rebuttal is fatal to its challenge, Petitioner attempts to raise the bar — to render strict scrutiny "strict in theory, but fatal in fact." See, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995) (citation and quotation marks omitted). First, Petitioner argues that the government bears the burden of proving the constitutionality of an affirmative action program — a proposition rejected by this Court in *Wygant*. Second, Petitioner contends that the government can only present a strong basis in evidence with statistical studies that control for every imaginable variable, and that a party challenging an affirmative action program can meet its burden simply by hypothesizing a factor or two that might possibly have changed the outcome. Third, Petitioner claims that anecdotal evidence has no place in the government's showing. All of Petitioner's arguments are foreclosed by existing precedent.

Equating affirmative action with the racist "separate but equal" doctrine enunciated in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), Adarand insists that race-conscious remedies for discrimination be eliminated altogether. It contends that affirmative action is superfluous in the contracting industry because victims of discrimination have another remedy: "a lawsuit." Pet. Br. 22. Unfortunately, however, the myriad

causes of action for racial discrimination created by state and federal law have proven ineffective in eradicating either current discrimination or the lingering effects of past discrimination. Affirmative action thus remains a vital tool in the anti-discrimination arsenal possessed by federal, state and local governments.

ARGUMENT

I. THE GOVERNMENT HAS A COMPELLING INTEREST IN REMEDYING THE EFFECTS OF PRIVATE DISCRIMINATION, WHICH HAMPER THE ABILITY OF MINORITY FIRMS TO COMPETE FOR FEDERAL CONTRACTS.

The panel below concluded that the federal government had the power to employ a race-conscious remedy to dismantle discriminatory barriers to competition for government construction contracts, even if those barriers were erected by private actors. Pet. App. 25-26, 50-52. The panel reasoned in part that "[t]he Constitution does not obligate Congress to stand by idly and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries * * * of the effects of racial prejudice." *Id.* at 52 (footnote omitted).

Apparently disagreeing with the latter proposition, Petitioner and its amicus, Center for Individual Rights, suggest that Congress lacked the power to redress some of the documented discriminatory barriers to entry and competition because it was unclear that the federal government had "passively participate[d]" in erecting those particular barriers. Pet. Br. 29 n.21; Amicus Br. 23-24 (disputing that federal "financial assistance" constituted sufficient participation to permit a federal remedy).

Petitioner's construction of the concept of passive participation and its exceedingly cramped view of the remedial powers of governments are at odds with this Court's clear holdings in *Croson*. In *Croson*, the plurality held, and a majority of the Justices agreed, that it is "clear" that a governmental body has authority to use race-conscious remedies "to eradicate the effects of *private* discrimination within its own legislative jurisdiction." *Croson*, 488 U.S. at 491-492 (plurality) (emphasis added); accord *id.* at 538 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).[3]

The plurality held that a government "passively participates" in private discrimination, and hence has an especially compelling interest in redressing it, when the government "possess[es] evidence that [its] *own spending practices are exacerbating a pattern* of prior discrimination." *Croson*, 488 U.S. at 504 (plurality) (emphasis added); *id.* at 538 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting) (agreeing with the plurality that "the interest in *ensuring that the government does not reflect and reinforce prior private discrimination in dispensing public contracts is* * * * *compelling*) (emphasis added).

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[3] This holding was consistent with abundant precedent establishing that "the government has a fundamental, overriding interest in eradicating [private] racial discrimination." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). See also *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624 (1984) (a State government's interest in "eliminating discrimination and assuring its citizens equal access to publicly available goods and services" is a "compelling * * * interest[] of the highest order"); *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976); *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88 (1945).

A government's spending practices "exacerbat[e] a pattern of prior discrimination" (*Croson*, 488 U.S. at 504 (plurality)) both (i) when the government funds discrimination, and (ii) when it perpetuates a pattern of past discrimination by funding the beneficiaries of discrimination to the exclusion of the discrimination's victims. Petitioner does not appear to dispute the first proposition — that the federal government has the power to remedy discrimination by prime contractors and others that receive federal funding for public projects. Nor could it. The plurality in *Croson* declared that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Id.* at 492 (citing *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973)).[4]

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[4] The power to remedy discrimination by the recipients of governmental funds, such as prime contractors, applies equally whether the recipients discriminate on public projects or instead limit their discriminatory conduct to private-sector projects. In both cases, whether directly or indirectly, the government is "financ[ing] the evil of private prejudice" (*Croson*, 488 U.S. at 492), by supplying the discriminator with the wherewithal to continue its conduct. "A State's constitutional obligation requires it to steer clear * * * of giving significant aid to institutions that practice racial or other invidious discrimination" — whether or not those institutions use the aid directly to implement their discrimination. *Norwood*, 413 U.S. at 467 (citation and quotation marks omitted). See also, *e.g.*, *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 916 (9th Cir. 1991) ("Mere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy" the compelling interest requirement). Cf. *Bob Jones Univ.*, 461 U.S. at 604. See Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1601-1603 (1998).

Petitioner's amicus errs in disputing the second proposition, that the federal government has the power to alter its spending practices to avoid perpetuating the effects of past discrimination. Amicus Br. Center for Individual Rights 23-24. A government's "spending practices * * * exacerbat[e]" and perpetuate the effects of a pattern of prior discrimination when the government awards new contracting opportunities to majority firms that are better able to compete than minority firms because they have enjoyed the benefits of past race-based preferential treatment. By "bestow[ing] its rewards on those persons or businesses that were positioned to thrive during a period of private racial discrimination," the government "tighte[ns] the deadhand grip of prior discrimination * * * on the present and future." *Croson*, 488 U.S. at 538 (Marshall, J., dissenting) (explaining the plurality's holding that the government has a compelling interest in avoiding spending decisions that "exacerbat[e] a pattern of prior discrimination"). Under such circumstances, the government has the power to act because, absent a remedy, federal funds will continue to be "*distributed in a manner which reinforce[s] prior patterns of discrimination.*" *Id.* at 504 (plurality) (emphasis added). See also *Concrete Works of Colorado, Inc.* v. *City and County of Denver*, 36 F.3d 1513, 1529 (10th Cir. 1994); *Associated Gen. Contractors, Inc.* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1413 n.10 (9th Cir. 1991); *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 916 n.6 (9th Cir. 1991); *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring).[5] In other contexts, this Court has

[5] Accord *Fullilove* v. *Klutznick*, 448 U.S. 448, 478 (1980) (plurality) (holding that Congress has the power to employ a remedy where "its traditional procurement practices, when applied to minority businesses, perpetuate the effects of prior discrimination"), *overruled in part on other grounds*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200 (1995).

held that the government has an affirmative *duty* to avoid perpetuating the effects of discrimination. See *Norwood*, 413 U.S. at 466 ("the Constitution does not permit the State to aid discrimination" through financial support to institutions that discriminate, "even where there is no precise causal relationship" between the financial support and the institution's "continued well-being").

In this case, the evidence showed that race-based barriers to entry and competition make it more difficult for minority-owned businesses to gain experience and to compete for public construction contracts. Pet. App. 31-49. Majority-owned contracting firms, as the beneficiaries of the discrimination, have access to comparatively cheaper capital, more favorable bond terms, and lower supply prices than minority businesses, better enabling them to submit a qualifying low bid for government work. Pet. App. 39-44; *The Compelling Interest*, 61 Fed. Reg. at 26,054-26,061. Majority contracting firms that have enjoyed unfettered entry into the construction industry may also have more experience than minority firms that have entered the market more recently as the result of discriminatory obstacles to business formation. Pet. App. 33-39; *The Compelling Interest*, 61 Fed. Reg. at 26,055-26,059. The panel correctly concluded that, absent a remedy, the federal government's "spending practices [would] exacerbat[e that] pattern" (*Croson*, 488 U.S. at 504) of discrimination and its lingering effects, by awarding new contracts to the market participants that are better able to compete because they have reaped the benefits of past or present discrimination. See Pet. App. 50-52; see also *id.* at 31 ("racial discrimination and its continuing effects have distorted the market for public [construction] contracts"); *id.* at 32-33

(finding "a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination").

Petitioner's amicus, the Center for Individual Rights, errs in deeming any effort by the government to ensure that its spending practices do not perpetuate the effects of past discrimination as a prohibited "attempt[] to remedy * * * societal discrimination." Amicus Br. 24. This Court has used the term "societal discrimination" to describe discrimination that is too "'amorphous'" and nonspecific, and too attenuated from the realm of the affirmative-action program, to permit a race-conscious remedy. *Croson*, 488 U.S. at 497 (citation omitted). Thus, for example, the doctrine concerning societal discrimination precludes a City from adopting affirmative action in construction contracting to redress "the sorry history of * * * discrimination in this country," absent evidence of specifically identified discrimination in the construction industry. *Id.* at 499. In the program at issue here, by contrast, the government employs a race-conscious remedy to redress *specifically identified* discrimination *in the construction industry itself*. Amicus's concern that the government's remedy is directed at "'amorphous'" discrimination that is far removed from the arena in which the discrimination is occurring is therefore misplaced.

To the extent that petitioner's amicus intends instead to suggest that the government lacks the power to redress discrimination by any actors in the construction industry other than direct federal fund recipients and prime contractors — such as banks, unions, suppliers, local contractors' associations, private-sector customers, and bonding companies — it also errs. This Court explicitly recognized in *Croson* that a government has "a compelling interest in preventing its tax dollars" from

exacerbating discrimination by "local contractors' associations," so long as the government documents the existence of such discrimination with sufficient particularity. See 488 U.S. at 503. The same reasoning applies to discrimination by other industry actors. The government put forth an enormous amount of direct and statistical evidence to support the inference that discrimination by a broad range of industry actors contributes substantially to the disadvantaged position of minority subcontractors in the construction industry. See Pet. App. 31-49. As just noted, discrimination by banks, bonding companies, and suppliers, for example, give nonminority contractors and subcontractors huge advantages in competing for federal contracts. By awarding contracts to majority companies that have a competitive advantage as a result of such discrimination, the federal government's spending practices "exacerbate" the effects of the discrimination by those industry actors. Under the doctrine this Court articulated in *Croson*, the government therefore has the power to remedy that conduct, so long as it is identified with the particularity required by the Fourteenth Amendment; and it is of no moment that the specific, identified discrimination occurs at the hands of one particular industry actor, like a bank, rather than another, such as a prime construction contractor. 488 U.S. at 504; *see also Fullilove*, 448 U.S. at 467 (plurality) (identifying discrimination that resulted in "deficiencies in working capital [and] inability to meet bonding requirements" as an appropriate basis for a federal remedy); Ayres, *supra*, 98 COLUM. L. REV. at 1610-1614 & n.129.

II. THE GOVERNMENT ADDUCED A STRONG EVIDENTIARY BASIS FOR INFERRING THAT DISCRIMINATION AND ITS LINGERING EFFECTS DISTORT THE PUBLICLY-FUNDED HIGHWAY CONSTRUCTION MARKET.

The government presented a wealth of specific and compelling evidence. Its statistical studies documented significant underutilization of minority construction businesses in comparison with their availability; discrimination by banks, bonding companies, and suppliers; and discriminatory impediments to business formation. The government buttressed these statistics with overwhelming anecdotal evidence that discrimination, both overt and subtle, and its lingering effects continue to pervade the construction industry. This evidence "more than satisfies the government's burden of production regarding the compelling interest for a race-conscious remedy." Pet. App. 54.

Unwilling to heed this Court's admonition that strict scrutiny must not be "strict in theory, but fatal in fact" (*Adarand*, 515 U.S. at 237 (citation and quotation marks omitted)), Adarand urges that the bar must be set higher — that the government must do more. Yet Petitioner has never, at any point in this case, presented any evidence to undermine the government's evidentiary showing that persistent discrimination in the federal contracting industry necessitates race-conscious remedial action. Petitioner now seeks to excuse that failure (and to make it easier to defeat affirmative action plans in the future) by shifting the burden of proof. Specifically, it (i) continues to attack the government's evidentiary showing on the basis of nothing more than sheer unsupported hypothesis; and (ii) criticizes the Court of Appeals' ruling that a party challenging the constitutionality of an affirmative action program must do more than sit on the sidelines and take

speculative potshots at the government's proof. This Court should rebuff Petitioner's attempts to undo decades of civil rights jurisprudence and to erect an insurmountable barrier to adoption of much-needed remedies.

A. Petitioner Has Blatantly Misstated The Burden Of Proof: Although The Government Bears The Initial Burden Of Production, The Challenger Bears The Ultimate Burden Of Persuasion.

Petitioner contends that "the government bears the burden of proving that [an affirmative action] program is constitutional." Pet. Br. 23 (quoting *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1033 (D. Minn. 1998)). It is not surprising that Petitioner's only source of support for this rather startling assertion is a lone district court opinion. What *is* surprising is Petitioner's decision to pursue this argument, given the clarity with which this Court has described the mechanics of the burden of proof in affirmative action cases.

Although the government bears the initial burden of producing a "strong basis in evidence for its conclusion that remedial action was necessary," the "ultimate burden remains with the [challenging party] to demonstrate the unconstitutionality of an affirmative-action program." *Wygant*, 476 U.S. at 277-278 (plurality); see also *id.* at 292-293 (O'Connor, J., concurring); *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 626 (1987). Once the government comes forward with a prima facie case of discrimination, the challenger bears the burden of rebutting that case and ultimately demonstrating the unconstitutionality of the program. *Ibid.* This regime of shifting burdens of proof is entirely logical: the *challenger* is the plaintiff and thus, as in

any civil case, must bear the ultimate burden of proof. *Wygant*, 476 U.S. at 278 (plurality).

B. This Court Should Rebuff Petitioner's Attempt To Shift The Burden Of Proof To The Government.

1. The Government's Data Sufficed To Create An Initial Inference Of Discrimination.

The government invoked numerous statistical studies that identified significant disparities between the utilization and availability of minority and majority contractors. Petitioner attacks this evidence, contending that some of the studies failed to control with sufficient precision for the possibility that the minority contractors who were passed over lacked the particular level of bonding, capitalization, and "expertise," if any, to perform each of the particular "contracts in question," and for the possibility that the minority contractors were "otherwise engaged at the time" the specific contracts were available. Pet. Br. 29. Fundamentally, petitioner is contending that, to create even an initial inference of discrimination, statistical studies must control not only for general qualification, willingness, and availability, but must go further, by eliminating all conceivable "nondiscriminatory explanations for disparate treatment between comparable individuals." Pet. Br. 30 (citation and quotation marks omitted). Any lesser showing, petitioner contends, would amount to nothing more than "'the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population.'" Pet. Br. 30 (quoting *Croson*, 488 U.S. at 507).

Petitioner grossly misconstrues this Court's decision in *Croson*. In *Croson*, the Court held that a comparison between

the utilization of minority contracting businesses and the availability of *minorities in the general work force at large* rested upon the impermissible assumption that minorities would enter the construction industry in exact proportion to their representation in the general population. 488 U.S. at 507. The Court never suggested that a comparison between the utilization and availability of minorities who *had actually chosen to enter the construction industry, and were operating construction businesses*, was not probative of discrimination. To the contrary, such a comparison of availability and utilization of functioning contracting firms is precisely what *Croson* envisioned. See *id.* at 501, 510.

Explicating its holding, the Court invoked *Ohio Contractors Ass'n* v. *Keip*, 713 F.2d 167, 171 (6th Cir. 1983), abrogated, *Associated General Contractors of Ohio, Inc.* v. *Drabik*, 214 F.3d 730 (6th Cir. 2000), as an example of a case in which the city properly determined "how many [minority businesses] in the relevant market are qualified to undertake prime or subcontracting work in public construction products." *Croson*, 488 U.S. at 502. *Croson* noted that in *Keip*, the government calculated a utilization disparity by "relying on *[the] percentage of minority [contracting] businesses in the [relevant jurisdiction]*" — with no purportedly more precise measure of qualification and availability than presence in the market. *Ibid.* (emphasis added); accord *id.* at 510 (chastising Richmond for not having "ascertained how many minority enterprises are *present* in the local construction market") (emphasis added). See also, *e.g.*, *Contractors Ass'n of E. Penn., Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1005 (3d Cir. 1993) (holding that a "disparity index," which "consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the 'population' of [local] construction firms,"

satisfies *Croson*); *Associated Gen. Contractors*, 950 F.2d at 1414 (same); *Cone Corp.* v. *Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990) (same).

Thus, contrary to Petitioner's contention, a documented disparity between the availability of minority businesses operating in the construction industry, and their utilization in that industry, does generate an initial inference of discrimination. As the Court below explained:

> We are certainly mindful that 'where special qualifications are necessary, the relevant statistical pool * * * must be the number of minorities qualified to undertake the particular task.' But here, we are unaware of such 'special qualifications' aside from the general qualifications necessary to operate a construction subcontracting business.

Pet. App. 45 (quoting *Croson*, 488 U.S. at 501-502) (emphasis in original).

The court below further observed that, although Petitioner speculated that minorities who had chosen to enter the construction industry might be less qualified, willing, and able to do construction work than majority individuals, Petitioner had failed to present *any* evidence to buttress that assumption. "[T]here is no evidence either in the record on appeal or in the legislative history before us that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications." *Id.* at 45-46 (emphasis in original). Absent such evidence, the assumption that minorities are any less qualified, willing or able than majority firms — for reasons other than the lingering effects of discrimination — is plainly impermissible.

Petitioner's insistence that the studies should have controlled for whether minority firms possessed sufficient bonding, capitalization, and experience is especially misplaced in light of the government's evidence that minority firms lack access to sufficient bonding, capitalization, and experience in some construction markets *precisely because of discrimination*. This evidence showed that these factors are not race-neutral explanations for the disparity, but rather race-tainted products of past discrimination. It is well established that a prima facie case of discrimination need never "control for" such race-tainted factors. See *Valentino* v. *United States Postal Serv.*, 674 F.2d 56, 71, 73 n.30 (D.C. Cir. 1982). Moreover, it is the *challenger* who bears the burden of proving that allegedly race-neutral factors are "not themselves tainted by * * * discrimination." *Sobel* v. *Yeshiva Univ.*, 839 F.2d 18, 35 (2d Cir. 1988). In this case, not only did Petitioner fail to meet its burden of demonstrating the race-neutrality of the factors for which it claimed the government should have controlled — but the government adduced substantial evidence establishing the opposite.

At bottom, Petitioner is seeking to shift the burden of proof to the government: it is asking this Court to require that the government *disprove* all conceivable nondiscriminatory explanations for the statistical disparity. We urge this Court to rebuff that attempt, as it is inconsistent with precedent and would make it very difficult for any governmental unit — federal, state or local — to put forth the required "strong basis in evidence" that would support an affirmative action program, even in the presence of the most urgent need for a remedy.

2. Persuasive Anecdotal Evidence Can Play A Significant Role In Informing And Reinforcing The Government's Statistical Showing.

In addition to its strong statistical showing, the government has invoked a mountain of anecdotal evidence to support its conclusion that discrimination continues to pervade the contracting industry. According to Petitioner, this anecdotal evidence has no place at all in the government's initial showing, and "may be considered only *after* a determination that the necessary statistical evidence of deliberate discrimination exists." Pet. Br. 29 (citation and quotation marks omitted) (emphasis added). This contention ignores the important role that anecdotal evidence can play in enabling a governmental body to explain a statistical disparity. The Court of Appeals correctly held that "[b]oth statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not." Pet. App. 29.

Anecdotal evidence has long been considered an important component of a prima facie case of a pattern or practice of discrimination. In *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court recognized the power of this type of evidence in adducing a prima facie case: "[T]his was not a case in which the Government relied on statistics alone. The individuals who testified about their personal experiences * * * brought the cold numbers convincingly to life." *Id.* at 339 (quotation marks omitted). See also, *e.g.*, *Croson*, 488 U.S. at 480 (holding that Richmond had not made a sufficient showing in part because it had no anecdotal or "direct" evidence to explain the cause of the statistical disparity; to the contrary, all of the witnesses had testified that their failure to use minority contractors resulted from the fact that such contractors "were just not available");

Contractors Ass'n, 6 F.3d at 1003 ("combination of anecdotal and statistical evidence" was "potent"; indeed, "anecdotal evidence alone may, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*") (citation and quotation marks omitted); *Mozee* v. *American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1039, 1043 (7th Cir. 1991) (same).

The government provided statements, *inter alia*, of minority contractors who arrived at job sites to find signs saying "No Niggers Allowed" and "Nigger get out of here," and who were told by prime contractors that, despite their low bids, they would not be hired because the prime contractors "had problems with minority subs in the past"; from minority business owners who testified that unions had rejected them on the basis of their race (see Pet. App. 35); and by minority business development experts and banking professionals, who testified about discrimination in lending. *The Compelling Interest*, 61 Fed. Reg. at 26,059 & n.100.[6] These statements

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[6] The government's anecdotal evidence also included, for example, "numerous detailed examples of the exclusionary operation of good old boy networks" (*The Compelling Interest*, 61 Fed. Reg. at 26,059 n.109) (citation and quotation marks omitted); the statements of "47 witnesses [who] reported specific incidents of racial discrimination * * * in attempting to secure performance bonds" (*The Compelling Interest*, 61 Fed. Reg. at 26,060 n.118 (citation and quotation marks omitted)); the statements of a "Hispanic business owner [who was] denied credit by [a] supplier who told him that 'we only sell on a cash basis to people of your kind'" (*id.* at 26,061 n.123 (citation omitted)); "frequent complaints pertaining to informal barriers [which] included being completely stopped by suppliers' discriminatory practices" (*ibid.*); and statements from "53 witnesses [who] reported specific incidents of racial discrimination * * * where materials or equipment suppliers would not extend the same payment terms and discounts to them as they knew were being made available

provide highly persuasive evidence that the demonstrated statistical disparities in subcontractor hiring are the result of past and present racial discrimination and not, as Petitioner conjectures, some race-neutral cause. In many cases, the testimony of union officials, bank employees, and members of the relevant industry is extremely probative and valuable because it enables the court to evaluate whether the government has raised an inference that the statistical disparities were actually caused by discrimination. Petitioner attacks the government for failing to demonstrate causation, but in many cases the inference of causation is best shown by reference to precisely the direct and anecdotal evidence that Petitioner would dismiss as lacking any real probative value.

C. Petitioner Has Failed To Meet Its Burden Of Persuasion.

1. Petitioner Failed To Rebut The Government's Statistical Showing.

Ultimately, Petitioner is objecting to the Court of Appeals' determination that the party challenging an affirmative action program must do more than just sit on the sidelines and criticize the government's statistical analysis: the challenger must produce concrete evidence that rebuts the government's showing.

The court below correctly held that "Adarand and the amici curiae supporting it have utterly failed to meet their 'ultimate burden' of introducing credible, particularized evidence to rebut the government's initial showing of the

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to white male owned contractors with the same financial histories" (*ibid.*) (citation, quotation marks and ellipses omitted). See generally *id.* at 26,059-26,061 & nn.100-125 (discussing anecdotal evidence in disparity studies incorporated in *The Compelling Interest*).

existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market." Pet. App. 50. As the Court of Appeals found, Petitioner merely issued "highly general criticism of the methodology of numerous 'disparity studies' cited by the government and its amici curiae as supplemental evidence of discrimination." *Id.* at 51. But the government is "not required to exhaust every possible source of evidence"; Adarand is "free to adduce countervailing evidence of [its] own." *Dothard* v. *Rawlinson*, 433 U.S. 321, 331 (1977). Adarand cannot prevail, because it has made "no attempt * * * — statistical or otherwise — to demonstrate that when the[] [omitted] factors were properly organized and accounted for there was no significant disparity." *Bazemore* v. *Friday*, 478 U.S. 385, 403 n.14 (1986).

2. Petitioner's Characterization Of The Obstacles Facing Minority Contracting Firms As Race-Neutral Finds No Support In The Evidentiary Record.

Petitioner attacks the Court of Appeals' determination that the following set of race-based barriers to entry and competition support an inference that discrimination hinders the ability of minority-owned firms to compete for government contracts: (1) the tendency of majority prime contractors to work only with other majority subcontractors; (2) majority prime contractors' use of bid shopping to undermine minority bids; (3) minority business owners' exclusion from unions; (4) the difficulty minority businesses have in obtaining sufficient credit; (5) minority businesses' comparative difficulty in obtaining bonding; and (6) minority businesses' comparative inability to obtain low prices from suppliers. Pet. Br. 27-28.

Petitioner speculates that each of these barriers might be explained by factors unrelated to discrimination. Petitioner hypothesizes, for example, that prime contractors might be rejecting minority subcontractors, not because of race, but instead because they simply prefer to work with white subcontractors with whom they have worked exclusively in the past, whom "they already trust." Pet. Br. 27-28. Petitioner conjectures that bid shopping might not be a pernicious means by which prime contractors intentionally evade the impartiality of blind bidding, but instead a harmless "practice by which prime contractors allow trusted former subcontractors to see and beat any lower bid from new, untested firms." *Ibid.* Unions might be excluding minority business owners not because of race, but because they have "no experience"; and banks and bonding companies might be denying credit and bonding, and giving comparatively unfavorable terms, to minority contractors more frequently than nonminority contractors because minority contractors lack "a credit history or collateral." *Ibid.* Petitioner also opines that perhaps minority businesses face higher prices from suppliers because they "have never purchased anything" from them before, rather than because the suppliers discriminate on the basis of race. *Ibid.*

There are at least two fatal problems with Petitioner's conveniently "race-neutral explanations" for the demonstrated disparate treatment suffered by minority businesses. First, these explanations are invented from whole cloth. Second, they are belied by the government's evidence, which is the only evidence in this case. As the Court of Appeals found, the government demonstrated that *racial discrimination* created these obstacles. "The government's evidence strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms." Pet. App. 41. The

government showed that white prime contractors prefer to work with white subcontractors not out of familiarity, but out of racism. *Id.* at 41-42. Bid shopping is not harmless favoritism toward trusted colleagues, but a form of "exclusion" that perpetuates the effects of past discrimination. *Id.* at 40-41. Minority business owners are not excluded from unions as a result of their inexperience; rather, the government produced "studies of statistical and anecdotal evidence finding racism by construction trade unions." *Id.* at 35; see also *Local 28, Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986). Minority firms have insufficient capital not because they lack collateral but because of "race-based denial of access to capital," of which "[t]he government's evidence is particularly striking." Pet. App. 35. Minority firms' lack of access to bonding is not merely an unfortunate byproduct of inexperience but rather of "overt racial discrimination in the bonding market." *Id.* at 41-42. Suppliers favor white subcontractors not because of long-standing relationships, but out of racism: "the government present[ed] evidence of discrimination by suppliers, the result of which is that nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors, driving up anticipated costs, and therefore the bid, for minority-owned businesses." *Id.* at 43-44 (citation and quotation marks omitted).

Petitioner has never put forth a shred of proof to rebut the government's evidence — to buttress its speculation that these obstacles might have been erected by forces other than discrimination. See Pet. App. 50-54. Just as with the government's statistical evidence, Petitioner is confusing the burden of proof: once the government came forth with evidence that these obstacles were rooted in racial bias, the burden shifted to Petitioner to prove — not just hypothesize —

some other cause. Petitioner "utterly failed" to do so. 228 F.3d at 1175.

It is true that in *Croson*, this Court held that the City of Richmond could not rely on "a host of nonracial factors which would seem to face a member of any racial group attempting to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, [and] unfamiliarity with bidding procedures." 488 U.S. at 498-499. But the government's reliance on these same factors is entirely different, and entirely appropriate, where the government has put forth hard evidence to demonstrate that these factors are not at all "nonracial" in nature — that they are the result of discrimination aimed particularly at minority-owned firms. This Court should reject Petitioner's argument that these factors can never contribute to an evidentiary showing of discrimination.

III. AFFIRMATIVE ACTION REMAINS A CONSTITUTIONAL AND NECESSARY REMEDY FOR ENTRENCHED DISCRIMINATION AND ITS LINGERING EFFECTS.

Dubbing its position the "Harlan Doctrine," Adarand equates affirmative action with the racist "separate but equal" doctrine that Justice Harlan condemned in his dissent in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), and demands that this Court abolish affirmative action entirely, or "at least as to government contracting." Pet. Br. 21. According to Adarand, affirmative action is unnecessary as a remedy for discrimination in contracting, because victims of discrimination "always" have another remedy at their disposal: "a lawsuit." Pet. Br. 22.

Adarand errs. This Court repeatedly has held that race-conscious remedies are entirely consistent with, and indeed are sometimes necessary to achieve, the constitutional mandate of

racial equality.[7] That is especially true where, as in the case of discrimination in construction contracting, the alternate remedy of "a lawsuit" — which has long been available — has proved monumentally ineffective in eradicating the identified discrimination and its effects. An array of federal and state laws have prohibited discrimination in contracting, lending, and union membership for decades.[8] Yet, as the federal government

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[7] This Court has endorsed affirmative action as a critical tool for "abolish[ing] traditional patterns of racial segregation and hierarchy" and "open[ing] * * * opportunities for [minorities] in occupations which have been traditionally closed to them." *United Steelworkers of Amer.* v. *Weber*, 443 U.S. 193, 203-204 (1979). It is effective both to "dismantle prior patterns of * * * discrimination and to prevent discrimination in the future." *Sheet Metal Workers*, 478 U.S. at 474. Thus, *race-conscious action* can be both necessary and effective to help achieve *racial equality*. See, *e.g.*, *McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971); *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971) (striking down ban on race-conscious treatment of students because it precluded an "effective remedy"). *Cf. Sheet Metal Workers*, 478 U.S. at 475 (refusing to interpret Title VII's prohibition against discrimination as a prohibition of race-conscious affirmative remedies, because to do so "would deprive the courts of an important means of enforcing [the] guarantee of equal employment opportunity").

[8] Section 1981 prohibits private parties from intentionally discriminating on the basis of race in the formation of contracts. 42 U.S.C. § 1981; *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Executive Order No. 11246 (1965) has long prohibited discrimination by federal contractors, and provides debarment as a remedy for a violation. Federal and state laws prohibit discrimination by lenders. See, *e.g.*, 15 U.S.C. § 1691. Title VII of the Civil Rights Act of 1964 forbids discrimination by labor unions. See 42 U.S.C. §§ 2000e-2(a), (d). Section 1983 allows individuals to sue officials for civil rights abuses committed under color of state law. 42 U.S.C. § 1983.

documented, current discrimination and the effects of decades of past discrimination continue to deny minority-owned businesses an equal opportunity to compete for federal contracts. See *The Compelling Interest*, 61 Fed. Reg. at 26,050.

The reasons that lawsuits have proven an ineffective remedy are manifold. First, and most importantly, the "remedy" of a lawsuit does nothing to address the "lingering effects" of past discrimination, which the government indisputably has the power to remedy. See *Adarand*, 515 U.S. at 237; *Croson*, 488 U.S. at 491. Such effects of past discrimination are among the most formidable obstacles to equal opportunity that confront minority construction firms. See *The Compelling Interest*, 61 Fed. Reg. at 26,054-26,061. Yet these lingering discriminatory effects often are the product of too many different kinds of discrimination by too many different actors to present a viable basis for legal action. Even if a cause of action were otherwise available, it would likely be time-barred. Thus, for example, discriminatory exclusion of minority firms from informal community business networks, which afford their members business alliances, contacts, and contracting opportunities, generally are not remediable by means of litigation.[9] Similarly,

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[9] Congress specifically found that other remedies, particularly anti-discrimination laws giving rise to a private right of action, have been ineffective in eradicating the effects of racism. See *The Compelling Interest*, 61 Fed. Reg. at 26,053 ("Congress has concluded that, standing alone, legislation that simply proscribes racial discrimination is an inadequate remedy. Congress also has attempted to redress the problems facing minority businesses through race-neutral assistance to all small businesses. Congress has determined, however, that those remedies, by themselves, are ineffectual in eradicating the effects of past discrimination, and that race-conscious measures are a necessary supplement to race neutral ones.") (citation and quotation marks omitted).

the government presented evidence that the more recent market entry of many minority firms is the result of generations of discrimination. See *The Compelling Interest*, 61 Fed. Reg. at 26,054; Point II.C.2 supra. To the extent, if any, that these disadvantages might preclude full future participation, they too would be irremediable absent affirmative action.

Second, discrimination often is very difficult to prove. See *The Compelling Interest*, 61 Fed. Reg. at 26,062 ("[D]iscrimination has been, in many instances, deliberate and overt. But it also can take a more subtle form that is inadvertent and unconscious."). See also, *e.g.*, *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992) ("[I]t must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* discrimination have been eliminated."). Indeed, a minority subcontractor often has no means of learning even whether it submitted the lowest bid, let alone whether the reason it was rejected was racial animus. See generally David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1. Requiring that records of subcontractor bidding processes be made public would not ameliorate this problem, as Adarand suggests (at Pet. Br. 22), because contractors often do not employ *any* formal bidding processes, and the "processes" they employ are too informal and subjective to reveal discrimination. See Robert E. Suggs, *Rethinking Minority Business Strategies*, 26 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 101, 115-116 (1990).

Third, minority-owned businesses often do not have the opportunity to bid for contracts in the first instance: "closed networks" of prime- and subcontractors are often unwilling to admit minority entrants. See *The Compelling Interest*, 61 Fed. Reg. at 26,058 ("[M]inority-owned firms are seldom or never invited to bid for subcontracts on projects that do not contain

affirmative action requirements.") (citing numerous studies). Even in the absence of blatantly race-based refusals to allow minority-owned firms to bid, these business networks "isolate [minority-owned firms] from the web of information which flows around opportunities, thereby putting them at a distinct disadvantage relative to nonminority firms." *Id.* at 26,060 (internal quotation marks and citations omitted).[10] Finally, even when minority-owned firms suspect discrimination and can adduce sufficient evidence of it, they are often unwilling to sue for fear that they will be blacklisted in their close-knit local industries when they bid for future projects.

For all of these reasons, the availability of antidiscrimination measures alone has proven inadequate to remedy the persistent discrimination, and its lingering effects, that distort the construction market. In such circumstances an affirmative remedy is both appropriate and necessary. See *Croson*, 488 U.S. at 509; sources cited *supra* note 7.

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[10] As a practical matter, the government cannot monitor the informal transfer of information about upcoming projects sufficiently to remedy this disadvantage in the absence of affirmative action. See *The Compelling Interest*, 61 Fed. Reg. at 26,059-26,060 & nn.110-112 (explaining that "[r]estricted access to business networks can particularly disadvantage minorities in the planning stages of government procurement" and discussing study "citing numerous allegations that black contractors learned of bid opportunities much later than their white competitors that are tied into the 'good old boy' network") (citations, quotation marks and ellipses omitted). See also *United States* v. *Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973) ("failure to order [word of mouth recruitment practices] to be supplemented by affirmative action * * * was clearly an abuse of discretion") (cited in *The Compelling Interest*, 61 Fed. Reg. at 26,060 n.110).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

J. WALLACE WORTHAM, JR.
JOHN R. GROSS
NORMAN R. BANGEMAN
DEAN SPEIRS
VICTORIA ORTEGA
LAURIE HEYDMAN
City and County of Denver
353 City and County Bldg.
1437 Bannock Street
Denver, Colorado 80202
(720) 913-3250

EILEEN PENNER
Counsel of Record
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

LAUREN J. ROSENBLUM
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019
(212) 506-2647

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